No. 87-486

Supreme Court, U.S.
FILED
OCT 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

MELBA J. TAYLOR, et al.,
Petitioners,

v.

HUDSON PULP AND PAPER CORP., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS UNITED PAPERWORKERS INTERNATIONAL UNION (UPIU), UPIU LOCAL UNION 641, UPIU LOCAL UNION 1565, UPIU LOCAL UNION 1717, UPIU LOCAL UNION 598, AND UPIU LOCAL UNION 852 IN OPPOSITION

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Statement of the Case

The statement of the case in the petition for certiorari omits pertinent facts.

The female petitioners complained of employment gender discrimination by their employer, respondent Hudson Pulp and Paper Corp., and the respondent unions, United

Paperworkers International Union and its Locals 641, 1565, 1717, 598 and 852 in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e), *et seq.* The local unions represent different employees in the workplace in which the petitioners were employed. All the petitioners were employed on jobs over which exclusive representation was exercised by Local 641 only. Petitioners charges with the Equal Employment Opportunity Commission named only their employer and Local 641. *42 U.S.C. 2000-5(b).*

At the trial, petitioners failed to adduce any evidence of discrimination by the unions during the actionable period. Their proof was limited to claims that they were aggrieved by the action of their employer in failing to transfer and promote them because of their sex. The petitioners' statement of the case addresses itself exclusively to alleged misconduct of their employer—making no claim that any of the unions were responsible for any of the alleged discrimimination.

The district court granted the unions' motion to dismiss the action against them pursuant to Rule 41(b) of the Federal Rules of Civil Procedure on the ground that the petitioners failed to establish a *prima facie* case at the conclusion of the petitioners' case-in-chief.

In its ruling the district court, after reviewing the evidence adduced against the employer, held that:

> "... the Court finds that there is absolutely no evidence whatsoever to hold the unions liable for any discriminatory practices in this case, and without a discussion of the evidence the motions should be granted as to the unions." (App. 43a)

The court of appeals affirmed by majority vote. Although both the majority and dissenting opinions discussed the evidence as to employer discrimination at length, neither opinion questioned or commented upon the district court's findings of fact and conclusions of law, as orally stated in open court, that there was "absolutely no evidence whatsoever to hold the unions liable". (App. 1a-38a)

Summary of the Argument

A petition for rehearing and suggestion for hearing *en banc* of the decision of the court of appeals was denied for the reason that no member of the panel nor Judge in regular active service requested that the Court be polled on rehearing *en banc*. (App. p. 37a-38a)

The petitioners now seek review of this decision on the same grounds urged in their petition for reconsideration, to wit:

(1) a conflict exists among the courts of appeals on whether the clearly erroneous standard of Fed. Rules of Civ. Proc. 52(a) is applicable to a determination of a *prima facie* case of employment discrimination;

(2) the court of appeals improperly made fact findings in reaching its decision of affirmance.[1]

1. Concurrent findings of two courts below are final on review by the Supreme Court in the absence of a very exceptional showing of error. *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214 (1948). This is especially valid where not a single judge in the Eleventh Circuit voted to consider the issues raised in seeking reconsideration—the same issues presented by the instant petition to this Court.

There is, in point of fact, no conflict among the courts of appeals on the application of the clearly erroneous standard in employment discrimination cases. Moreover, this Court has resolved the procedural question raised in several of its decisions.

As to the second question presented, the court of appeals did not make new findings of fact essential to sustain its decision of affirmance. It merely referred to some of the evidence in considering petitioners' factual contentions and in concluding that the trial court's findings were not clearly erroneous. Indeed, it made no reference whatever to the facts applicable to the unions' responsibility—since there were no such facts.

In all events, the unions cannot plainly be found responsible for employment discrimination under any legal principles where no evidence of any acts of improper conduct on their part was adduced at the trial.

Finally, any procedural error that may be found to have occurred would constitute harmless error pursuant to 28 U.S.C. Sec. 2111 in the case of the unions.[2] None of the substantial rights of the petitioners were adversely affected by the dismissal of their cause of action against the unions in the absence of any evidence against them.

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2. 28 U.S.C. Sec. 2111:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

ARGUMENT

I. It is well settled that the clearly erroneous standard is applicable to the review of a *prima facie* case determination.

Petitioners rely heavily on the opinion of Judge Wallace in the case of *Gay* v. *Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531, 545 (9th Cir. 1982) in which he acknowledges but dissents from the preponderance of appellate decisions holding that the clearly erroneous standard is applicable to the review of *prima facie* case determinations. To reach his conception, Judge Wallace was compelled to distinguish the holdings in *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982). In that disparate impact case, this Court held that a district court's findings of discrimination in a Title VII action is a factual finding that may be overturned on appeal only if it is clearly erroneous as provided in Fed. Rules of Civ. Proc. 52(a).

The Ninth Circuit decision noted, as the petition points out at pp. 11-12, that the *Swint* case, *id.* involved a disparate impact case rather than a disparate treatment case under Title VII. The case on review before the court of appeals was a disparate treatment case. It reasoned that the Supreme Court's holding in *Swint*, *id.* that the clearly erroneous standard should be applied on appeal was not applicable to a disparate treatment case. 694 F.2d at 545, n.14 [3]

3. Under the disparate treatment theory, a complainant must prove that he or she was treated less favorably than others because of his or her race, color, religion, sex or national origin. Discriminatory intent is a necessary element of proof in disparate treatment cases. Discriminatory motive need not be proved in a case involving

(footnote continued on next page)

The underpinnings of Judge Wallace's opinion were removed by the subsequent decision of this Court in the case of *Anderson* v. *City of Bessemer*, 470 U.S. 564 (1985), a disparate treatment case.

In *Anderson*, supra, the U.S. Supreme Court made it crystal clear that:

> ". . . the standard governing appellate review of a district court's finding of discrimination is that set forth in Federal Rule of Civil Procedure 52(a): 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.' The question before us, then, is whether the Court of Appeals erred in holding the District Court's finding of discrimination to be clearly erroneous'." *Id* at 573

Not finding that the trial judge's findings of discrimination (disparate treatment) was clearly erroneous, the Supreme Court reversed the judgment of the court of appeals which refused to accept the district court's findings. Thus, no doubt remains as to the application of the clearly erroneous rule in discrimination cases.

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disparate impact. "It is well established under Title VII that claims of employment discrimination because of race may arise in two different ways. *Teamsters* v. *United States*, 431 U.S. 324, 335-336 n.15 (1977). An individual may allege that he has been subjected to 'disparate treatment' because of his race, or that he has been the victim of a facially neutral practice having a 'disparate impact' on his racial group." *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 581-588 (1978) Marshall, J., concurring in part

II. There is no merit to petitioners' contention that a conflict exists as to the application of the clearly erroneous standard to employment discrimination cases.

A district court may arrive at findings of fact which are not clearly erroneous yet apply erroneous principles of law. An appellate court can review the law applied and determine whether a *prima facie* case of discrimination was established under applicable law.

In discussing whether the proper legal conclusions were reached by a trial court, expressions such as "matter of law" "legal conclusions", etc. may creep into the opinion. It does not follow from this that the reviewing court did not apply the clearly erroneous standard to the finding of fact in the case.

The cases cited by the petitioners, (some of which ante dated *Anderson, supra,*) do not support their basic contention that there is a division among the circuits on the application of the clearly erroneous rule.[4] To the contrary, these cases acknowledge the authority of the erroneous standard of review where applicable. Consequently, the petitioners have failed to establish a divergence of opinion by the appeal courts on the question.

In *Carmichael* v. *Birmingham Saw Works*, 738 F.2d 1126, 1130 (11th Cir. 1984), the court acknowledged the appropriate standard of review in the following words:

> "This Court may reverse a district court's finding of no intentional discrimination only if that finding is

4. Petition, p. 13, n.8

> clearly erroneous, or is based on clearly erroneous subsidiary findings of fact or on a mistaken view of the law. *Pullman-Standard* v. *Swint*, 1982, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66".

The quotation from this decision by the petitioners refers to a question other than the one in this case.

In *Jackson* v. *RKO Bottlers of Toledo*, 743 F.2d 370, 377 (6th Cir. 1984), cert. denied, 106 S.Ct. 3298 (1986), the appellate court reversed because the trial court applied the wrong legal principles to the facts in the case.

In *Nix* v. *WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1187 (11th Cir. 1984), the appellate court in laying out the perimeters of its review in that case stated:

> "Intentional discrimination is an issue of fact. *Pullman-Standard* v. *Swint*, 1982, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66. '[T]his Court may reverse a finding of intentional discrimination only if the finding is clearly erroneous.' *Lincoln* v. *Board of Regents*, 11 Cir. 1983, 697 F.2d 928, 940, cert. denied 1983, —— U.S. —— 104 S.Ct. 97, 78 L.Ed. 2d 102."

In *Zuniga* v. *Kleberg County Hospital*, 692 F.2d 986 (5th Cir. 1982), the issue in the case was whether termination of a pregnant x-ray technician hindered women's employment opportunities in violation of the statute, a purely legal question.

In *Moore* v. *Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir. 1983), the appellate court set forth as its recognized standard of review of the decision in that case:

> "The findings of fact made by a trial court following the granting of a Rule 41(b) motion for involuntary

dismissal will not be set aside unless clearly erroneous. *Sime* v. *Trustees of the California State University and Colleges*, 526 F.2d 1112, 1113 (9th Cir. 1975)"

In *Lynch* v. *Freeman*, 817 F.2d 380 (6th Cir. 1987), the district court dismissed the employment discrimination case because the acknowledged uneven burden on women was not substantial and there was no evidence of intentional disparate treatment. The court of appeals determined that the case also involved disparate impact which required no proof of intent. It accordingly reversed the ruling which had been based on a mistaken view of the applicable law. The issue of standard of proof was not involved.

Petitioners have failed to demonstrate a serious and substantial conflict among the appellate courts. The cases cited by petitioners do not stand for rejection of the clearly erroneous rule and hence do not establish the claimed conflict among the circuits.

In all events, the paramount rulings of this Court in *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), and *Anderson* v. *City of Bessemer*, 470 U.S. 564 (1985), put to rest any claims that this Court should address and resolve the issue of review standards in discrimination cases. It has already done so.

III. The court of appeals made no *de novo* findings of fact essential to affirm the judgment.

As the majority opinion of the court of appeals noted, the district court found that the petitioners had failed to demonstrate that it met the necessary four criteria for establishing a *prima facie* discrimination case.

McDonnell Douglas Corp. v. *Green,* 411 U.S. 792, 802 (1973); *Perryman* v. *Johnson Products Co., Inc.,* 698 F.2d 1138, 1141 (11th Cir. 1983); (App. 6a)

This case was resolved on the basis of the absence of evidence upon which findings of liability could be made, causing the non-suit. The subsequent discussion in the majority opinion of the court of appeals simply explained why the decision of the trial court due to the lack of evidence was not clearly erroneous and why petitioners factual arguments lacked merit.

Moreover, there was no discussion or even reference to any findings involving the unions in either the majority or the minority opinions of the court of appeals. The negative finding of the trial court "that there is absolutely no evidence whatsoever to hold the unions liable for discriminatory practices" was not questioned by the appellate court in either the majority or minority opinions. There were no new or additional findings of any nature involving the unions made by the court of appeals.

Consequently, it cannot be argued that the court of appeals' alleged findings filled a critical gap in the facts to sustain the district court's dismissal of the petitioners' case against the unions. There can be a gap in a trial court's findings when upholding the establishment of a *prima facie* case which a court of appeals may not supply. This is not a case where an essential element to a cause of action may have been omitted at the trial level and then added by the appellate court. Here there is an absolute absence of any proof to sustain findings of a *prima facie* case of employment discrimination against the unions, findings and conclusions which the appellate court did not question.

IV. Where no evidence whatever is adduced against a party at trial, judgment of dismissal can be affirmed on the facts or the law or both.

One need not engage in a hair-splitting exercise as to whether an appeals court should review a ruling of failure to establish a *prima facie* case under the erroneous standard or the plenary review standard where as in this case the same result would be reached because of "absolutely no evidence whatsoever" against the unions.

As Judge Wallace pointed out in the *Gay* v. *Waiter's and Dairy Lunchmen's Union*, 694 F.2d 531, 545, 546 (9th Cir. 1982) case:

> "If we freely review the district judge's conclusion that no *prima facie* case has been demonstrated and conclude that he was correct, we would, obviously, come to the same conclusion if we followed the same restrictive clearly erroneous standard of review."

Again, in the case of *Spaulding* v. *University of Washington*, 740 F.2d 686, 699 (9th Cir. 1984), cert. denied 469 U.S. 1036 (1984), Judge Wallace made the same point:

> "Our past cases have not been consistent on whether our review of the lower court's ultimate finding regarding establishment of a prima facie case is de novo or under a clearly erroneous standard (citing cases). We need not decide which standard is correct because in this case . . . we reach the same conclusion under either one."

It is evident that a trial court has no alternative to a dismissal of a cause of action when no evidence to establish

that cause of action has been presented at trial. A reviewing court can do no less than uphold such a dismissal since there is no evidence to evaluate and no law to apply.

Although the petitioners' claims and arguments are confined to the employer, they have never discontinued against the unions, forcing the unions to continue to defend. The petitioners' persistence in continuing to pursue claims against the unions in this Court is unwarranted and baseless.

V. Procedural errors, if any, constitute harmless error in the case of the dismissal for lack of evidence to constitute a *prima facie* case.

Assuming, *arguendo*, that procedual errors were committed in the proceedings below, there can be no findings of liability nor should a party be compelled to put in a defense where, as in this case, there is absolutely no evidence whatsoever of any improper acts of discrimination by the unions. Judgment favoring the unions must remain as the outcome of any remand, even if the standards of review urged by the petitioners were applied or the court of appeals avoided the factual discussion objected to by the petitioners.

Since the results would be the same, any error would constitute harmless error raising no substantial questions for the consideration of this Court. *28 U.S.C. 2111.*

Conclusion

For the reasons above set forth, it is respectfully submitted that the petition for certiorari herein is wholly without merit and should be denied.

Respectfully submitted,

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